CLARK *v.* HUGO, et al.

June 16, 1921.

[107 S. E. 730.]

1. Appeal and Error (§ 870 (6)*)—Setting Aside Verdict in First Trial Held Subject to Review in Error Proceedings on a Subsequent Verdict Notwithstanding Change in Code.—Where in proceedings to probate a will, the first trial resulted in verdict for the will which was set aside and on the second trial a verdict against the will was rendered, the action of the court in setting aside the first verdict may be inquired into on error proceedings based on the judgment following the last verdict, notwithstanding Code 1919, § 6363, omits the provisions of Code 1904, § 3484, relating to the rule of decision where a new trial has been granted, the first trial having been had before the Code of 1919 went into effect, so that the court under the practice then prevailing could not have entered a final judgment for either party.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 427.]

2. Wills (§ 198*)—Destruction of Subsequent Inconsistent Will Does Not Revive Former Will.—Where a will is revoked by a subsequent inconsistent will, the destruction of the latter will does not have the effect of reviving the former, even though the testator so intended, in view of Code 1919, § 5234.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 758.]

3. Wills (§ 72*)—Formal Signature and Acknowledgment Does Not Constitute a Will, in Absence of Testamentary Intent.—That an instrument is formally signed and acknowledged in accord with statutory requirements does not make it a will, in the absence of testamentary intent.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 722.]

4. Wills (§ 93*)—Parol Evidence Admissible to Show Want of Testamentary Intent, but Not that Will Depends on Conditions.—Where the facts justify it, an instrument which on its face is testamentary may be shown by parol not to have been such, but such evidence is not admissible to show that the operation of the will absolute in its terms depends upon conditions.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 716.]

5. Wills (§ 93*)—Subsequent Will Held under Evidence to Lack Animus Testandi.—Where a testator made a will and subsequently executed another instrument in form a complete will, which was alleged to constitute a revocation of the first will, evidence held to show that the last will lacked the essential animus testandi.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 762.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Trial (§ 260 (1)*)—Requested Instructions Covered by Others Properly Refused.—Requested instructions may properly be refused where their substance has been covered by other instructions given.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

7. Wills (§ 296*)—Evidence Admissible as to Testator's Intent to Revoke by Execution of Subsequent Will.—Where a testator made a will, and subsequently executed another instrument in form a complete will, claimed to constitute a revocation of the first, evidence by the scrivener of the first will that the testator inquired of him whether such will would stand as against a contest held properly admitted on the issue of testator's intent to revoke the first will by such second will.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 316.]

8. Wills (§ 296*)—Evidence as to Testator's Intent in Executing a Purported Second Will Held Admissible.—On an issue as to whether testator by executing an instrument in form a will thereby intended to revoke a former will, evidence that the first will still remained in possession of the scrivener, and that the second will was subsequently destroyed by the testator, held admissible to show intent.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 316.]

Error to Circuit Court of City of Norfolk.

Proceedings by Eva Catherine Clark against Randolph B. Hugo and others for the probate of the last will and testament of Cyrus Warden, deceased. A judgment against the will was rendered, and proponent brings error. Reversed and rendered.

Thos. H. Willcox, of Norfolk, for plaintiff in error.

W. S. Morris, Jr., Harry E. McCoy, and *Jas. G. Martin,* all of Norfolk, for defendants in error.

ELTERICH et al. *v.* LEIGHT REAL ESTATE CO., Inc.

June 16, 1921.

[107 S. E. 735.]

1. Covenants (§ 51 (3)*)—Two Family House Held "an Apartment House" within Restrictive Covenant.—A house built for two families held an "apartment house" within building restriction covenant against the construction of an "apartment house" on the land, in view of the other provisions of deed making it appear that the restriction was in furtherance of an undertaking to develop the locality in which the land was situated as a high-class residential suburb, and in view of the evidence as to the meaning of the term in the minds of the parties at the time of the execution of the deed.

[Ed. Note.—For other definitions, see Words and Phrases, First

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.